United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Original

74-2520

To be argued by
STANLEY L. KANTOR

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

CAROL CROOKS,
Plaintiff-Appellee,

against

JANICE WARNE, individually and as Warden of the Bedford Hills Correctional Facility; CAPTAIN WOOLEY, individually and in her capacity as Captain at the Bedford Hills Correctional Facility; LIEUTENANT CRATTLE, individually and in her capacity as Lieutenant at the Bedford Hills Correctional Facility,
Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-5168

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

STANLEY L. KANTOR
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

1

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

MISCELLANEOUS

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAROL CROOKS,

Plaintiff-Appellee,

against

JANICE WARNE, individually and as Warden of the Bedford Hills Correctional Facility; CAPTAIN WOOLEY, individually and in her capacity as Captain at the Bedford Hills Correctional Facility; LIEUTENANT CRATTLE, individually and in her capacity as Lieutenant at the Bedford Hills Correctional Facility,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

This is an appeal by defendants-appellants, (hereafter "defendants") employees of the Bedford Hills Correctional Facility, from a final judgment and order, including a preliminary injunction issued by the United States District Court for the Southern District of New York (BRIEANT, D.J.), granting a preliminary and subsequent permanent injunction enjoining defendants from placing plaintiff-appellee (hereafter "plaintiff"), a prisoner then at the Bedford Hills Correctional Facility, in the facility's special housing unit unless certain procedural safeguards were accorded her, and declaring certain actions, as more fully set forth *infra* of the Correctional Facility's Adjustment Committee, as violative of plaintiff's right to not be deprived of liberty without due process.

Questions Presented

1. Does due process require a full-dress adversary-type proceeding in the context of prisoner evaluation, where the determination to be made is focused on current attitudes rather than on past misbehavior and the action is not intended to be punitive nor to adjudicate violations of facility rules and regulations?

2. Did the District Court err and/or abuse its discretion in establishing a rigid pre-notice detention period of not more than 24 hours?

3. Did the District Court err in not *sua sponte* dismissing the action as moot?

Statement of the Case

A. Prior Proceedings

On May 31, 1974, plaintiff, then an inmate at the Bedford Hills Correctional Facility, filed a complaint in the United States District Court for the Southern District of New York, alleging certain action of defendants violated her civil rights. The complaint alleged that she was confined in the Bedford Hills special housing unit from May 23, 1974 to the date of the complaint without notice of charge, a hearing and without an opportunity to confront and cross-examine witnesses against her, having previously served a 60-day sentence (Complt. ¶ 10, 4a). The complaint additionally alleged that the actions of the defendants in extending her time in segregation without such a hearing violated her rights under the Eighth and Fourteenth Amendments to the Constitution and gave her a claim under 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

As a result of defendants' actions, plaintiff asked that the Court issue a declaratory judgment declaring her constitu-

tional rights to have been violated, order that she be released from the special housing unit and that defendants be enjoined from placing her in punitive segregation without a hearing (5a).

Plaintiff also sought a preliminary injunction enjoining *pendente lite* her continuation in segregation. On June 14, 1974 an answer was filed putting certain of the allegations in issue and setting forth four affirmative defenses, including the procedure followed by the Adjustment Committee, showing the reasonableness of the determinations, that plaintiff had a history of assaultive behavior, making her, at that time, unfit for release to the general population at a medium security facility; and that the Court lacked jurisdiction and the complaint failed to state a claim (17a-21a).

Pursuant to an oral stipulation of the parties and Rule 65(a)(2) of the Federal Rules of Civil Procedure, the trial on the merits was advanced and consolidated with the hearing on the preliminary injunction. The trial was held on July 1 and 2, 1974 before the Hon. Charles L. Brieant, Jr., at the conclusion of which the Court, in light of the subsequently decided *Wolff* v. *McDonnell,* 418 U.S. 41 L.Ed. 2d 935 (1974) found a basis for issuing a preliminary injunction (T. 349-361).

On October 1, 1974, the Court issued its findings of fact and conclusions of law (362-387); and on October 11, 1974, the Court issued its final judgment. The judgment declared that the Adjustment Committee proceedings of May 23, 26; June 3, 6, 13 and 20, 1974 deprived plaintiff of liberty without due process because of the absence of advance notice to her of the charges to be considered; and the Committee was not an impartial tribunal. In addition, the Court mandated that certain procedures be followed before the Adjustment Committee of the institution may take any action. The order also held that plaintiff may be subjected to disciplinary action involving punitive segregation only after a finding of misconduct based on "objective facts".

Finally, the Court ordered that there were two circumstances where plaintiff could be segregated from the population without a full dress due process hearing upon notice and stated charges. These were for a maximum 24 hour period before notice was served upon her; and where there was an objective, factual determination that she presents a clear and present danger to herself, other prisoners or corrections officers (392-394). The Court further mandated if plaintiff is segregated administratively, she should be granted every privilege accorded to the general inmate population, concomitant with her segregated status (394). (406-407).

A timely notice of appeal was taken from this judgment (A-).

B. Bedford Hills Correctional Facility

The Bedford Hills Correctional Facility was at the time of trial, the only correctional facility in New York State, then housing adult, sane, female offenders. It is, like Wallkill Correctional Facility, a medium security facility, without wall towers, solid walls or built-in controls. Its perimeter is bounded only by a chain-link fence, and movement within the facility is free, all inmates, except those in the Special Housing Unit, moving on pass. Under regulations of the Department of Correctional Services, Bedford Hills Correctional Facility is an institution for the confinement of females, 16 years of age or older, used for [7 NYCRR § 100.80(c)(1)-(3)]:

> "(1) General confinement facility;
>
> (2) Reception Center for (i) all females committed to the custody of the department by any court in this State under indeterminate sentence or reformatory sentence; and (ii) all females of whatever age who have been or who hereafter are, committed or transferred to or placed in an institution for the retarded in the de-

partment pursuant to commitment or order of any court of this State; and (iii) all females committed as juvenile delinquents or wayward minors who are committed, transferred to or placed in the care or custody of the department;

(3) Detention center;

(4) Work release facility for eligible inmates."*

See also Corrections Law § 71 and former Corrections Law §§ 90-94, repealed L. 1970, c. 476 § 10. As the trial court noted (365):

"... all sorts of female prisoners are confined at Bedford Hills, without regard to their relative incorrigibility, their disruptiveness, or whether they are serving short or long terms, and without regard to the nature of their prior felonious activity ..."

This diverse inmate population contrasts vividly with that of Wallkill, the men's medium security Correctional Facility. In *Newkirk* v. *Butler*, 364 F. Supp. 497 (S.D.N.Y. 1973), *aff'd.* 499 F.2d 1214 (2d Cir. 1974), *cert. gr. sub nom. Preiser* v. *Newkirk*, 43 USLW 3239 (10/21/74), the Court concerned itself with transfers from medium to maximum security correctional facilities. This Court described Wallkill as follows (499 F. 2d at 1215):

"Wallkill is a unique state correctional facility because it permits its inmates who live in rooms rather than cell blocks, maximum free time and freedom of movement and give access to numerous recreational and rehabilitative programs not available at other state correction facilities. Because of its several advantages ... admission to Wallkill is generally sought after

---

* While at all times here relevant, Bedford Hills was the only Correctional Facility housing adult, female felons, subsequent thereto, the Department of Correctional Services opened two small (30-35 each) female facilities. 7 NYCRR §§ 100.91, 100.96.

> and usually comes only after a state prisoner has spent time at a maximum security facility and has undergone an extensive screening procedure."

Thus, while the population at Wallkill is fairly homogeneous, the population at Bedford Hills, consisting of the young, the mature, and aged female prisoners, whether first or multiple offenders, and whether convicted of murder or fraud; and whether violent or passive, places a burden upon the facility administration to identify and segregate from the general population, those inmates that have demonstrated a tendency toward violent behavior so that at an open institution, they will not bring terror and harm to women who, whether for physical or psychological reasons, are unable to defend themselves (365-6):

C. Adjustment Committees and Superintendent's Proceedings

Bedford Hills, as has all other correctional facilities within the State, has designated one of its housing units as a Special Housing Unit. The Special Housing Unit at the Facility is termed "West Wing" and it contains within it women in diverse categories. These include quarantine, those in protective custody, furlough returnees and adjustment and discipline (224-6). Aside from the fifteen rooms in the Special Housing Unit, the only facility in which inmates can be housed outside of the general population is in the hospital, but, as explained by Superintendent Warne, as the rooms there do not have "sanitary facilities", it cannot be used to house problem inmates.

Under the regulations, a special housing unit is defined as [7 NYCRR § 300.2(b)]:

> "A cell or group of cells within a facility, maintained separate and apart from cells used by inmates in the general population, for confinement of inmates who are not in a program that permits them to commingle with the general inmate population."

A segregation unit is defined by the regulations [7 NYCRR § 300.2(c)] as:

> "A special housing unit for confinement of a single inmate or for the confinement of a number of inmates who are not in a program that permits them to commingle with each other."

Special housing units are used for a variety of purposes. These are set forth in 7 NYCRR § 300.3(b), and include service as a reception, detention, diagnostic and treatment center, and as a work release facility; to house those inmates physicially unable to participate in the general facility programs or assigned to outside work gangs, to house those in need of protection, and [7 NYCRR § 300.3(b)(3)]:

> ". . . controlling inmates whose violent emotions are out of control or who refuse to behave in an orderly fashion . . ."

In addition, special housing units provide a place for confinement of a person pursuant to a disposition made in a superintendent's proceeding [7 NYCRR § 300.3(b)(4)].

The rooms in the special housing unit at Bedford Hills are of the same type as those throughout the facility,* and are equipped in accordance with the minimum standards set forth in 7 NYCRR Part 301.

Rule infractions at Bedford Hills are dealt with either through a Superintendent's Proceeding or by way of the Adjustment Committee, the former being punitive and adversarial in nature and reserved for serious violations, the latter being informal and tending toward securing through conversation and counselling, the inmate's willingness to abide by the rules of the facility.

The Adjustment Committee process is begun when the Committee receives from the Superintendent, an inmate misbehavior report, or when a matter is referred to it

---

* There are no barred cells or cell blocks at Bedford Hills.

A segregation unit is defined by the regulations [7 NYCRR § 300.2(c)] as:

> "A special housing unit for confinement of a single inmate or for the confinement of a number of inmates who are not in a program that permits them to commingle with each other."

Special housing units are used for a variety of purposes. These are set forth in 7 NYCRR § 300.3(b), and include service as a reception, detention, diagnostic and treatment center, and as a work release facility; to house those inmates physicially unable to participate in the general facility programs or assigned to outside work gangs, to house those in need of protection, and [7 NYCRR § 300.3(b)(3)]:

> ". . . controlling inmates whose violent emotions are out of control or who refuse to behave in an orderly fashion . . ."

In addition, special housing units provide a place for confinement of a person pursuant to a disposition made in a superintendent's proceeding [7 NYCRR § 300.3(b)(4)].

The rooms in the special housing unit at Bedford Hills are of the same type as those throughout the facility,* and are equipped in accordance with the minimum standards set forth in 7 NYCRR Part 301.

Rule infractions at Bedford Hills are dealt with either through a Superintendent's Proceeding or by way of the Adjustment Committee, the former being punitive and adversarial in nature and reserved for serious violations, the latter being informal and tending toward securing through conversation and counselling, the inmate's willingness to abide by the rules of the facility.

The Adjustment Committee process is begun when the Committee receives from the Superintendent, an inmate misbehavior report, or when a matter is referred to it

---

* There are no barred cells or cell blocks at Bedford Hills.

ment's rules and policies governing inmate behavior." 7 NYCRR § 252.5(a).** The action taken by the Adjustment Committee is required to be based on its evaluation of the inmate on the whole, as well as on the facts and circumstances of the incident, though it need not find that the subject inmate violated any rule. The regulations further mandate, 7 NYCRR §252.5(b):

> "The Committee . . . shall not direct the action it takes toward the objective of imposing punishment for a violation. The action taken by the committee shall be focused upon the need for maintaining discipline and order within the facility and the degree to which the inmate has been and is cooperating with that need."

In pursuit of these objectives, the Committee is required to counsel with the inmate regarding the need for the rule and pointing out the unsatisfactory elements of the inmate's behavior. 7 NYCRR § 252.5(c). Where, the inmate has demonstrated and the Committee has determined that the inmate has formed "a genuine intention to cooperate, and that he will do so to the best of his ability" without further Committee action, it may defer action for up to three months. 7 NYCRR § 252.5(d) and (g). Finally, the Committee in appropriate circumstances may restrict an inmate's activity to an extent appropriate "to bring the behavior of the inmate within acceptable limits" and "to control the inmate." 7 NYCRR § 252.5(e). These restrictions include loss of privileges for not more than 30 days (now not more than two weeks); room or cell confinement for a period not exceeding two weeks (now only one week) or, in those instances where his behavior disrupts the order and discipline of his housing unit or his

---

** As discussed in the text, all actions authorized to be taken by the Adjustment Committee, were those authorized to be taken by it prior to the decision of *Wolff* v. *McDonnell, supra.* The regulations have since been amended and where pertinent, are annexed hereto as Appendix I.

presence there is inconsistent with the best interests of the facility, confinement in a special housing unit. 7 NYCRR § 252.5 (e) (3).

Where action is taken restricting an inmate's activities, including placement in the special housing unit, the Committee may either during or at the end of the period of restriction direct that the inmate appear before it for the purpose of determining whether there has been any "change in the attitude of the inmate that would tend to assure his future cooperation with the policies of the department." Where such change has occurred, the Committee can act to remove the activities restrictions and where it has not, it may extend the period successively or add restrictions. 7 NYCRR § 252.5(f).

In contrast with the attempts at readjustment at the Adjustment Committee, a Superintendent's Proceeding is both punitive and adversary in nature. A Superintendent's Proceeding is instituted either in those instances where there is reason to believe that an inmate's behavior constitutes a danger to life, health, security or property or where the efforts at informal adjustment have failed because of the inmate's wilful failure or refusal to follow the guidance of the Adjustment Committee. 7 NYCRR § 253.1(a). Once the facility Superintendent has determined that a proceeding should be held, he directs an employee to prepare and file a formal charge, with specifications. An employee, usually either the Superintendent or a Deputy Superintendent, must be appointed to preside, and the presiding officer designates an employee to assist the inmate.* The inmate assistant then delivers the written charges and specifications to the inmate, discusses

---

* The presiding officer, consonant with the adversary nature of the proceedings, may not be a person who witnessed the incident, a person directly involved or the person who prepared the charge. However, that the presiding officer sat on the Adjustment Committee and in that capacity reviewed the incident does not, in and of itself, disqualify that individual. 7 NYCRR § 253.2(c).

with him the procedure to be followed, and is responsible for ascertaining and investigating any factual claim made by the inmate, and report thereon to the presiding officer. 7 NYCRR § 253.3.

Thereafter, the inmate appears before the presiding officer and is informed that all statements made by him are privileged to the extent that they cannot be used against him in any criminal trial and if he wishes to remain silent, no inference can be drawn against him therefrom. The inmate is then interviewed as to whether he admits the charge or any variation of it or denies it. If no admission is made then a further investigation is made by the presiding officer. The determination proceeds by means of independent interviews of employees or other persons having pertinent information, followed by an opportunity for the charged inmate to comment on the statements made by the interviewees. After completion of this process, the presiding officer determines whether the charge should be dismissed or sustained. If sustained, it must be supported by substantial evidence. 7 NYCRR § 253.4.*

If the charge is sustained, the presiding officer may impose penalties ranging from a reprimand, to room, cell or special housing confinement for a period up to 60 days, coupled with a more restricted diet for such a period.** In addition, as a result of the Superintendent's Proceeding, the inmate may lose a specific amount of good behavior time and may be ordered to make restitution to the State out of funds credited or to be credited to him, for his intentional damage to institution property, and may be referred to the Adjustment Committee for action or further action. 7 NYCRR § 253.5(a).

---

* At least one court has held that such determination, at least as to procedural matters, is reviewable in the State courts by way of an Article 78 proceeding. *Matter of Salinas* v. *Henderson*, 40 A D 2d 939 (4th Dept. 1972).

** In such circumstances, however, the inmate must be supplied with a sufficient quanitity of wholesome and nutritious food.

D. The Trial

Trial was held on July 1 and 2, 1974 in the United States District Court for the Southern District of New York before the Hon. Charles L. Brieant, Jr., sitting without a jury (T. 1). At trial, numerous witnesses were called by plaintiff, a 27-year-old prisoner serving an indeterminate 15-year sentence for manslaughter in the first degree plus concurrent indeterminate 4-year sentences for attempted homicide, assault in the second degree and possession of a dangerous drug in the fourth degree (T. 102, 184). The assault to which plaintiff pleaded guilty, was an assault on a Rikers Island Correction Officer, where she was housed while awaiting trial on a manslaughter charge (T. 182-3).

On February 3, 1974, plaintiff engaged in an assault on four corrections officers at the Bedford Hills facility, resulting in serious injury to all of them, to the extent that at the time of trial, two of them were still on workmen's compensation leave, recuperating from the injuries sustained as a result of plaintiff's actions (T. 217).* On March 5, 1974, a Superintendent's Proceeding was held. Plaintiff, despite being informed that any statement made therein could not be used against her at a criminal trial, nevertheless stood mute. As a result of the Superintendent's Proceeding, a penalty was imposed of 60 days in segregation, loss of 6 months good time and referral to the Adjustment Committee (T. 103). A week later, plaintiff met with the Adjustment Committee with regard to an unrelated matter involving the taking apart of her bed and covering her door window (T. 105, 161-4).

Subsequent thereto, plaintiff was transferred from Bedford Hills to the Westchester County Jail to await trial on the criminal assault indictment, but she was returned to Bedford Hills without explanation or without completing her trial (T. 110).

---

* At the time of trial, plaintiff was under indictment for the alleged assault.

Thereafter, her sixty-day confinement period was continued and ended on May 24, 1974. On that day she met with an Adjustment Committee consisting of Captain Woolley, the Education Supervisor, Mr. Smith and chaired by Lieutenant Cradle (T. 115-119). Prior to the meeting a discussion was held between Captain Woolley, Superintendent Warne and Lieutenant Cradle concerning the procedure to be followed at the Adjustment Committee following plaintiff's completion of her mandatory stay in the special housing unit (T. 245). The Committee Chairman was informed by Mrs. Warne that if they determined to keep her in the special housing unit they would have to see her again within seven days (T. 247). At the Adjustment Committee meeting itself, plaintiff was informed that taking into consideration her overall pattern of behavior, the Committee felt it best to continue her in the special housing unit, but that she would be seen within the week. Plaintiff then inquired as to her privileges, and was informed that she would be confined "under segregation rules."* Captain Woolley stated that she felt that plaintiff had shown no remorse or any change in attitude concerning her approach to other inmates or corrections personnel (T. 275). While the psychologist had attempted to counsel with plaintiff, there was no psychiatric report available to the Adjustment Committee, as plaintiff had refused to see her (T. 279).

The following day plaintiff again engaged in a controversy with the facility's officials in that despite direct orders to do so she refused to "lock in". Subsequent thereto, the Committee met with plaintiff each week until trial. At each meeting she demonstrated a willful disregard of the Committee, comporting herself in almost a contemptuous manner, to the extent of, on one occasion, taking five of the Committee's inmate misbehavior reports concerning plaintiff. Based on the misconduct and her

---

* Superintendent Warne explained that no one is confined in the Special Housing Unit except under "seg" rules.

attitude toward the rules of inmate conduct, coupled with her past history of assaultiveness, the Adjustment Committee that met with plaintiff determined that she was not then ready to return to the general population.

There was no doubt that although plaintiff was informed by the Adjustment Committee that she would be seen weekly, she was never given prior written notice of the incidents to be considered in evaluating her attitude, but that she was, in accordance with the procedures (See *ante*, pp. 7-9), offered an opportunity to explain her conduct, which she declined to do. Similarly, plaintiff at the Adjustment Committee meetings, consonant with its counseling and evaluative rather than adversarial functions, was not permitted to confront or cross-examine witnesses nor was she permitted to call witnesses on her own behalf, however, the evidence in the record indicates that had she disputed any of the misbehavior reports, an investigation would have ensued to ascertain any further facts necessary to reach a determination (T. 221-4). There is no dispute but that she was not given a written determination but rather orally advised of the disposition and Adjustment Committee action (T. 196). Finally, as the trial court found, that no matter how an inmate becomes housed in segregation, there is no distinction in the mode of confinement once there; that is that they are keep-locked all the time, unless out on detail or for their daily shower, or for their one hour of exercise, or to receive visitors (T. 233-4).

Opinion Below

The opinion of the United States District Court is not yet officially reported and is contained in the appendix.

The Court found that despite the variety of procedures available in dealing with recalcitrant inmates, there is only one facility where all such disciplined inmates are

kept, under the same conditions, regardless of the cause, the nature of the misconduct or the procedure used (366).

While the Court recognized that the distinctions between the rigid procedure of the Superintendent's Proceeding and the flexible inquiry of the Adjustment Committee are sound in theory, in that the Adjustment Committee proceeds with a non-punitive intent to effect changes in the inmate's behavior, the Superintendent's Proceeding is frankly punitive and disciplinary, as a practical matter there is no distinction. The Court in so finding focused on essentially three aspects of the proceedings: the manner of institution, the possible range of dispositions, and the fact that neither procedure functions in the absence of objective acts of misconduct.*

The Court also inferred that where such segregation was invoked because objective misconduct intended for primary and secondary deterrence must be considered to be punitive, and plaintiff was not placed in segregation solely for "correctional treatment goals" (371).

The Court, in contending with the facts of the case found several defects in the process used in the content of imposing further segregation after the expiration of the 60-day period imposed by the Superintendent's Proceeding. First, the Court found that the meeting with the Superintendent prior to the Adjustment Committee, a tentative conclusion was reached to continue plaintiff in segregation, the conclusion not arrived at after a hearing.

---

* The Court navigated around the attitudinal focus of the Adjustment Committee by stating:

> "We consider the presence of a lack of genuine intention to cooperate with the administration. An intent to intimidate other inmates or correction officers, an intent to engage in assaultive behavior or an intent to conduct oneself in a manner contemptuous of the administration, when evidenced by more than the intuitive reaction of the charging officer, as objective misconduct." (370-1)

The Court after discussing *Wolff* v. *McDonnell,* 418 U.S. ——, 41 L. Ed. 2d 935 (1974) and finding it, because of its non-retroactivity, inapplicable to all proceedings at issue in this case, then proceeded to discuss the standard enunciated under *Sostre* v. *McGinnis,* 442 F. 2d 178 (2d Cir.), *cert. den.* 404 U.S. 1049 (1971), noting that under *Sostre* there was no written notice requirement, nor any requirement of statement of reasons or evidence relied upon, nor a written record. The Court, nevertheless found that the Adjustment Committee procedures were inadequate to comply with *Sostre,* as no *advance* oral notice was given and the "tribunal" was not impartial because of the presence on the panel of officers involved in previous *investigations* of incidents of misconduct.

The Court then proceeds to a discussion of issues not dealt with in *Wolff, supra* and specifically left open by the *Sostre* decision: the issue of open-ended confinement, coupled with periodic reviews, and the procedure that must accompany such reviews. The Court stated, analogizing to *Baxtrom* v. *Herold,* 383 U.S. 107 (1966):

> "Without such safeguard the modified panoply of procedural rights granted inmates would be meaningless, if subject to be divested of any further rights with respect to continued confinement and periodic review thereof."

Therefore, the Court concludes that the weekly Adjustment Committee meetings wherein plaintiff is to be evaluated as to any change in attitude is governed by the *Wolff* procedures, notwithstanding the existence of a subsisting factual determination after a formal disciplinary procedure complying with *Wolff,* contemplating an attitude evaluatory referral to the Adjustment Committee, as was the situation in the instant case.*

---

* Whatever may be the procedural inadequacies when the Adjustment Committee undertakes an *initial* review on the basis of an inmate misbehavior report, that case is not here presented.

Lastly, the Court differentiated between "administrative" confinement and punitive confinement, holding that the *Wolff* standards are not applicable where the inmate, based upon an objective factual determination, made in good faith by a disinterested official that plaintiff must be kept away from the prison population, the conditions of her segregation must be such as to grant her every privilege granted inmates in the population consonant with her segregated status.*

Based upon these findings and conclusions, the Court issued the order here for review.

POINT I

Due process does not require a full dress adversary type proceeding in situations where the determination to be made is focused on current attitudes rather than on past misbehavior, and the action is not intended to be punitive nor to adjudicate violations of facility rules and regulations.

The District Court, in its opinion, recognizing that plaintiff is a hostile and contentious inmate, more interested in vindicating her own view of her rights than is accommodating to prison discipline and doing "easy time" or earning good time and favorable parole consideration, held that de-

---

* The Court gave as instances where such non-punitive segregation would be appropriate instances where an inmate poses a clear and present danger to herself, other prisoners or the institution's staff. The Court wrote (385):

> "Clearly where defendants have had to deal with a highly volatile, contentious and assaultive inmate, previously convicted of manslaughter, who had injured four corrections officers in a subsequent scuffle, it cannot be said with certainty that she no longer poses a clear and present danger to the security of the institution, as well as the safety of the other inmates. This is all the more so in light of plaintiff's repeated outbursts and refusal to comply voluntarily with institutional rules until faced with a show of physical force."

fendants acted on a reasonable basis in not returning plaintiff to the general prison population (390). In so doing however, the Court held that without a full due process hearing complying with the standards enunciated by the Supreme Court in *Wolff* v. *McDonnell*, 418 U.S. ——, 41 L. Ed. 2d 935 (1974), it could not be under the same circumstances as those confined after a Superintendent's Proceeding (385-6). In so holding, the Court failed to take cognizance of the fundamental distinction between the goals of an Adjustment Committee proceeding and those of a Superintendent's proceeding, even though the distinction between the two are clearly set forth in Department regulations and recognized by this Court. In *United States ex rel. Haymes* v. *Montanye*, —— F. 2d —— (Dkt. No. 74-1208, October 4, 1974) (1974 2d Cir. Slip Op. 21), this Court took the occasion to commend as "specific" and "sensitive" the procedures now here for review. In cases of serious infractions, such as an assault on corrections staff or an attempted escape, a Superintendent's Proceeding is convened to *adjudicate* the issues of fact and impose *penalties* or *sanctions* to serve both as a primary and secondary deterrence and to vindicate the authority of the corrections facility.* In an Adjustment Committee proceeding, on the other hand, the focus is not necessarily directed toward adjudicating violations of inmate rules. Indeed, the regulations then in effect, as well as currently, provide that the Adjustment Committee action is *not* to be directed toward punishment for a specific infraction, rather toward evaluating the inmate's attitude toward the need for maintaining order within the facility. 7 NYCRR § 252.5(b). It is in this light that the efficacy of engrafting an adversary gloss on to the Adjustment Committee's proceeding must be considered.

---

* These goals are, in many respects, similar to those of society in general in enforcing its penal statutes. *Price* v. *Johnston*, 334 U.S. 266 (1948); *Landman* v. *Royster*, 333 F. Supp. 621, 643 (E.D. Va. 1971).

In *Greene* v. *McElroy*, 360 U.S. 474, 496-7 (1959), the Court wrote:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, *and the reasonableness of the action depends on fact findings*, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

See also *Wolff* v. *McDonnell*, *supra*, 41 L. Ed. 2d at 974 (DOUGLAS, J., dissenting). However, where the approach is evaluatory in nature, focusing on such intangibles as "sincere intention to comport oneself with the rules and regulations of the correctional facility", or appreciation of the need to maintain order within the institution, the use of an adversary proceeding is of little benefit, as in those instances where the Committee is not necessarily adjudicating past anti-social conduct but rather looking at the inmate herself and determining what courses of action are necessary in light of the inmate's attitude toward other inmates, corrections employees and the corrections regimen itself in order to ascertain appropriate conduct on the part of an inmate.

Nothing could more clearly demonstrate this evaluatory approach than the instant case. Plaintiff, having once been convicted by a plea of guilty of assaulting a corrections officer, had been found after a Superintendent's Proceeding, to which she offered no defense whatever, of assaulting and seriously injuring four additional corrections officers. As a result, the Superintendent's Proceeding placed her in punitive segregation for a sixty-day period and referred the matter to the Adjustment Committee, not to readjudicate the factual issues but to evaluate, at the end of the sixty-day period, whether or not a sufficient change in attitude had occurred for to release her to a less restrictive mode of confinement without such a change would be

an irresponsible act, inviting further assaults on the corrections staff or perhaps the inmate population.* At the first such meeting she showed no feelings of remorse or contrition and was elusive when asked whether she would do it again. It was therefore determined to keep her in segregation for the time being, pending a further review a week later. To engraft an adversary proceeding upon such an inquiry would not, by any means, make it more efficacious for there is no *fact* to adjudicate, but an attitude to examine.

Moreover, the use of an adversary posture would inhibit the proper functioning of the Committee were it adversarial in nature. In *Menechino* v. *Oswald,* 430 F. 2d 403 (2d Cir. 1970), *cert. den.* 400 U.S. 1023 (1971), this Court took the occasion to examine what process is due an inmate at a parole release hearing. The Court, finding that an adversarial posture is neither necessary nor desirable focused not on the risk the inmate is exposed to (conditional liberty as against continued confinement) but upon the nature of the inquiry. Writing for this Court, then District Judge Mansfield stated (430 F. 2d at 407-408):

> "On the erroneous assumption that the Board's determination of whether a prisoner should be paroled is an adversary proceeding, the complaint alleges that the Board fails to give appellant 'notice of charges' or accusations against appellant. Nor is the Board neces-

---

* This Court in *Williams* v. *Vincent,* —— F.2d —— (Dkt. No. 73-2781, 12/30/74) (1974 2d Cir. Slip Op. 1107), recently stated that corrections officials could be, under certain circumstances, held liable for damages under 42 U.S.C. § 1983 for injury sustained by an inmate upon the act of another inmate. The Court wrote (*Id.* at 1114-1115):

> "In the same way an isolated omission to act by a state prison guard does not support a claim under § 1983 absent circumstances indicating an evil intent or recklessness or at least deliberate indifference to the consequences of his conduct for those under his control and dependent upon him."

sarily called upon, in deciding whether he should be released on parole, to resolve disputed issues of fact, which might be the occasion for use of skills associated with lawyers, judges and the judicial process.

The Board's function is a different one. It must make the broad determination of whether rehabilitation of the prisoner and the best interests of society generally would be best served by permitting him to serve his sentence beyond the confines of prison walls rather than by being continued in physical confinement. In making that determination, the Board is not restricted by rules of evidence or procedures developed for determining legal or factual issues. It must consider many factors of a non-legal nature, such as psychiatric reports with respect to the prisoners, his mental and moral attitudes, his vocational education and training, the manner in which he has used his recreation time, his physical and emotional health, his intra-personal relations with prison staff and other inmates, his habits, and the nature and extent of community resources that will be available to him upon his release, including the environment to which he plans to return."

Based on these factors, the Court concluded (430 F. 2d at 407):

> "In the present case, some of the essential conditions for requiring due process as a matter of constitutional right are missing. In the first place the Board of Parole is not appellant's adversary. On the contrary the Board has an identity of interest with him to the extent that it is seeking to encourage and foster his rehabilitation and readjustment to society."

More recently, in *United States ex rel. Johnson* v. *Board of Parole,* 500 F. 2d 925 (2d Cir. 1974), vac. as moot *sub nom. Regan* v. *Johnson,* —— U.S. ——, 43 USLW 3294 (11/11/74). This Court again had occasion to consider

the adequacy of the parole release procedures. Without conceding so much of the correctness of the decision insofar as it requires written criteria and a full statement of reasons, or the validity of the decision itself, the Court re-emphasizes even in light of *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972); *Graham* v. *Richardson*, 403 U.S. 365 (1971) and of course *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) that *Menechino, supra* is still valid. The Court stated (500 F. 2d at 928):

> "Accordingly, we conclude, in light of *Morrissey* that some degree of due process attaches to parole release proceedings. This conclusion does not overrule *Menechino* which held that an inmate being considered for parole was not entitled to the full panoply of due process rights, including a specification of charges, counsel and cross-examination in a non-adversarial determination. A determination that an inmate is entitled to one due process weapon . . . would not necessarily entitle him to the full panoply."

Cf. *Drown* v. *Portsmouth School District*, 435 F. 2d 1182 (1st Cir.), *cert. den.* 402 U.S. 972 (1970).

The clear upshot of the foregoing then is irrespective of what process is due an inmate when an infraction of inmate rules is to be adjudicated involving a "grievous loss", where the aproach is an evaluative one to determine whether an inmate having had such an adjudication is ready to be returned to the general inmate population, when such evaluation is contemplated by the original order.* Therefore, to the extent that the District Court's

---

* The non-adjudicative but attitude evaluatory nature of adjustment proceedings is further exemplified by 7 NYCRR § 252.6, which reads:

> "Where an inmate persists in failure or refusal to follow the instructions of the adjustment committee, or where the committee is of the opinion that a procedure involving formal

(footnote continued on following page)

order requires that prior to the retention in segregation, corrections officials afford inmates with written notice of charges at least 24 hours prior to the holding of the hearing, an impartial panel, the opportunity to produce witnesses and documents unless they conflict with institutional goals and written notice of disposition upon stated reasons, should be vacated.

POINT II

The District Court erred and abused its discretion in establishing a rigid pre-notice detention period of not more than twenty-four hours.

The final judgment and order of the District Court provides in part:

> "8. If plaintiff is charged with an act of misconduct she may be segregated administratively (see paragraph 9*) but for such period of time that it takes to draft and file charges, and to give her the 24 hours notice specified in paragraph 3. Under no circumstances is she to be segregated for more than 24 hours before written notice of charges are served on her.
>
> * * *
>
> 10. If plaintiff is segregated administratively as specified in paragraph 9 she shall be granted every privilege accorded to the general prison population, concomitant with her segregated status."

(*footnote continued from preceding page*)

findings and punitive sanctions is necessary, the committee shall recommend to the superintendent that a superintendent's proceeding be held." See also the new 7 NYCRR § 252.4(d)(2)(4).

* Paragraph 9 permits administrative segregation without an adversary hearing after an objective, factual determination that plaintiff presents a clear and present danger to herself, other prisoners or to correction officers. The inherent defects in this order will be discussed, *infra*.

While due process normally requires a hearing prior to the imposition of sanctions or the withdrawal of privileges, such is not universally the case. In *Goldberg* v. *Kelly*, 397 U.S. 254, n. 10 at 263-4, the Supreme Court recognized such exceptions:

> "One Court of Appeals has stated: 'In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing.' *R.A. Holman & Co.* v. *SEC*, 112 U.S. App. D.C. 43, 47, 299 F. 2d 127, 13, cert. denied, 370 U.S. 911 (1962) (suspension of exemption from stock registration requirement). See also, for example, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *North America Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human use); *Yakus* v. *United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *Gonzalez* v. *Freeman*, 118 U.S. App. D.C. 180, 334 F. 2d 570 (1964) (disqualification of a contractor to do business with the Government). In *Cafeteria-Restaurant Workers Union* v. *McElroy*, *supra* at 896, summary dismissal of a public employee was upheld because '[i]n [its] proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control', and because the case involved the Government's 'dispatch of its own internal affairs.' Cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940)."

See also *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Sanford* v. *Rockefeller*, —— N Y 2d —— (1974). In *Sanford*, the New York Court of Appeals upon remand from the Supreme Court for reconsideration in light of *Arnett*, *supra*. *Sanford* v. *Wilson*, 418 U.S. ——, 40 L. Ed. 2d 755 (1974). The question presented in that case involved

the constitutionality of New York Civil Service Law § 210(2).* The provisions under challenge there provided for the summary interposition of penalties for those public employees who engage in a strike. The chief executive officer of the government struck, upon the basis of an *ex parte* investigation and affidavits, determines first whether a strike has or is occurring, and then again, upon the basis of an *ex parte* investigation ascertains the names of the employees who have so acted. The employee is thereafter informed of the determination and the penalties are imposed. The Court considered the issue of whether or not the imposition of penalties without a prior hearing violated due process. In holding that it did not, the Court wrote (Slip Op. 17-18):

> "The problem of a strike, in direct or masked form, by masses of public employees is unlike any of the situations to which the 'due process' cases above discussed have addressed themselves. For three decades the Legislature has experimented with various schemes to maintain public services against coercion threat or fact of a public employee strike. All of the schemes in one way or another have tried to protect the employees 'right to his job', while also providing an effective deterrent against the strike as a weapon. At the same time it may be assumed that consideration was given to the fact that the public employee could make his influence felt and heeded by the Legislature and the Executive.
>
> * * *
>
> In all categories involving the taking of rights, property, jobs and other benefits, the factor most import-

---

* Civil Service Law § 210(2) provides a means whereby a determination that a public employee, employed by the State or any of its subdivisions, has engaged in a strike or concerted work stoppage or slowdown, made illegal by the Civil Service Law. Such a finding imposes penalties including a fine and loss of tenure for one year.

ant to be considered is the irreversible or irreparable harm which may be visited upon the person in the event that the sanction should not have been imposed. On this view the temporary suspension of tenure or the imposition of fines under the Taylor Law is of no consequence. In the event of mistake, the tenure right and payroll deductions are restored with retroactive effect.

On the government there is a grave condition when the mass strike is contemplated. If hundreds, and more likely many thousands, of administrative hearings are to be required automatically, prior to the imposition of penalties afforded by the statute, with the usual resort to judicial review after the administrative hearing, the government service could be tied up internally for years and at great expense. . . . More important, with the passage of time the substantive issue, as in these cases, gets lost in the procedural thicket. Obviously, such a system is not a deterrent but could well become an added weapon in the hands of those who might seek to bring pressure on the public employer."

Placing the need for summary action and subsequent hearings in the context of the instant case, deference must be paid to the principal needs of providing for the safety of inmates, the security of the institution and the realities of the institution subculture. The Supreme Court in *Wolff, supra,* took pains to point out the environment in which disciplinary proceedings took place, specifically leaving open the question of when, and under what circumstances a hearing may be held after the imposition of sanctions. The Court noted, 41 L. Ed. 2d at 954:

"Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have

> repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for rules designed to provide an orderly and reasonably safe prison life."

In speaking to the issue of the environment in which disciplinary hearings take place, the Court further stated (*Id.*):

> "The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. *Retaliation is much more than a theoretical possibility;* and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonism on the important aims of the correctional process." [Emphasis added]

In balancing these factors, the court below recognized that there may well be a need to separate plaintiff from the population prior to affording her a disciplinary hearing, however, it erred in setting a rigid maximum of twenty-four hours pending service of notice of charges. In some instances, riots for just one example, it may well be impossible to complete the full investigation and serve a notice of charges in that comparatively short period. See *Wilson* v. *Beame,* 380 F. Supp. 1232 (E.D.N.Y. 1974),* no limit found on minimum administrative segregation period for inmates who have attempted to escape or for those awaiting disciplinary hearings; United States Bureau of Prisons State-

---

* Decided before *Wolff* v. *McDonnell,* but distinguishing between punitive segregation (consequent stigma and loss of privileges) and administrative segregation. 380 F. Supp. at 1236.

ment on Inmate Discipline 7400.5B, subd. 6 (6-6-72). In *Robbins* v. *Kleindienst,* 383 F. Supp. 239, n. 5 at 248 (D.D.C. 1974), noted that there may be situations where an inmate might have to be transferred prior to affording him the hearing required by due process. See *Newkirk* v. *Buller, supra.* The Court, borrowing from *Kessler* v. *Cupp,* 372 F. Supp. 76 (D. Ore. 1973), stated:

> "It should be crystal clear, however, that the determination of the institution-wide emergency situation is one which calls into play the informed expertise of the Superintendent or Warden. Courts cannot and should not 'second guess' wardens on this score."

See *Procunier* v. *Martinez,* 416 U.S. 396 (1974), where the Court also recognized that, to some extent, the needs of security of the institution and safety of inmates and staff, are principal responsibilities of the Warden, and such concerns may presumably require that a putatively miscreant inmate be placed in close custody until such time as charges can be served and a Superintendent's or Adjustment Committee proceeding commenced.* The Court wrote, 416 U.S. at :

> "Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape and

---

* Several instances where service of notice of charges prior to separation from the general population would be self-defeating should suffice. Where the facility administration learns of escape plans of a particular inmate, service of charges may well be the precipitant factor in bringing the plan to fruitation. Similarly, reported instances of intimidations or threatened violence of other inmates or staff should allow an inmate to be segregated pending charges and hearing. Finally destruction of institution property, of discovery of weapons would also justify such pre-hearing segregation and where such segregation is justified while written notice should be given as soon as possible the exigencies of institution problems such as an incipient riot or other mass action, may have to take precedence over service of charges for longer than 24 hours.

> for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody."

It is therefore urged that the order, insofar as it requires pre-notice segregation be limited to a rigid maximum of 24 hours is error as a matter of law** and should be vacated.

POINT III

The Court erred in not dismissing *sua sponte*, the action as being moot.

It is well settled that the jurisdiction of the federal judiciary is limited to "cases" and "controversies" and once an action is moot the Court is ousted of jurisdiction and nothing remains to be done except declare the fact and dismiss the action. In *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) the Court reiterated the usual rule that an actual case or controversy

> ". . . must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated."

Roe v. *Wade*, 410 U.S. 113, 125 (1973); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

In the instant case, the Court recognized the possibility of plaintiff's subsequent transfer to Fishkill from Bedford Hills by no action of any of the defendants raised the possibility of mootness. The Court, however, rejected the notion on the grounds that "state officials may reassign

---

** Appellants are also at a loss to explain the interrelationship of paragraphs 8 and 9. Paragraph 8 allows a pre-notice detention period of 24 hours while paragraph 9 permits unlimited administrative segregation upon an objective factual determination made in good faith by a disinterested official that plaintiff presents a clear and present danger to herself, other inmates or correctional staff, without any hearing at all.

plaintiff to Bedford Hills again at any time, and if reassigned, it is likely she will become subject of further disciplinary proceedings" (363-4).*

The mootness extant in the instant case arises not from any voluntary cessation of any purported illegality on the part of the named defendants, nor upon the mere removal of plaintiff from segregation with the distinct possibility of her being again subjected to action *on the part of defendants* yet not capable of review. Compare, in this regard *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Lines Assn.*, 166 U.S. 290, 308, 310 (1897); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Roe* v. *Wade, supra.* In the instant case, on September 1, 1974, by order of the Department of Correctional Services, plaintiff was removed from the custody of defendants, thereby rendering academic, the issue of whether any disciplinary proceeding could be conducted by them against her, especially where such proceedings involved the institution's Adjustment Committee.

Lastly, like *DeFunis, supra,* the instant action is not a class action and involves only the rights of appellee. The removal of plaintiff from Bedford Hills was not disciplinary nor was it designed to intentionally avoid adjudication of the issue, rather it was due to factors instrinsic to the lawsuit.

The remote possibility of being again transferred to defendants' jurisdiction is insufficient to keep jurisdiction, therefore the case should have been dismissed by the District Court. See *United States ex rel. Johnson* v. *Board of Parole, supra.*

---

* That at the trial level defendants did not raise the issue of mootness is of no moment as mootness goes to the court's very jurisdiction and, as such, cannot be waived.

CONCLUSION

The decision of the United States District Court for the Southern District of New York should be reversed, the judgment appealed from vacated and the action dismissed.

Dated: New York, New York February 3, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

STANLEY L. KANTOR
Assistant Attorney General
of Counsel

APPENDIX I

Rules and Regulations.

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
ALBANY, N.Y. 12226

PETER PREISER
COMMISSIONER

Pursuant to the authority vested in me as the State Commissioner of Correctional Services under Correction Law sections 112 and 137, I do hereby promulgate the following rules and regulations:

I. Part 251 of chapter five of title seven of the official compilation of codes, rules and regulations of the state of New York is hereby amended by adding thereto a new section, to be section 251.7, to read as follows:

251.7 Admission to special housing units. Detention admission, adjustment admission or protective admission of an inmate to a special housing unit shall be in accord with part 304 of chapter six.

II. Subdivisions (a) and (e) of section 252.1 of such chapter and title are hereby REPEALED, and such section is hereby amended by adding thereto three new subdivisions, to be subdivisions (a), (e) and (f) respectively, to read as follows:

(a) There shall be in each correctional facility a committee to be known as the "adjustment committee."

(e) At the time a designation is made, the superintendent shall cause the name of the person designated as chairman, member or alternate, as the case may be, to be recorded and a file thereof maintained as official records of the facility.

(f) In any correctional facility with an inmate population of 100 or less the employee in charge of program or if such person be the superintendent, then the superintendent or his designee shall perform the function of the adjustment committee.

III. The head note of section 252.3 of such chapter and title entitled: "Meetings and Review of Reports." is hereby REPEALED, and such section is hereby amended by adding thereto a new head note to read as follows:

Evaluation of alleged incidents of inmate misbehavior.

IV. Subdivision (b) of section 252.4 of such chapter and title is hereby REPEALED, and such section is hereby amended by adding thereto a new subdivision, to be subdivision (b), to read as follows:

(b) The adjustment committee may adopt any one of the following courses of action:

(1) where the committee is of the opinion that the misbehavior report or infraction slip was not appropriately issued, the committee shall recommend to the superintendent that the report or slip be nullified;

(2) where the committee is of the opinion that an inmate's behavior may have constituted a grave danger to life, health or security or has constituted a danger to a substantial amount of property and that a disciplinary sanction is necessary for the purpose of general or individual deterrence or for the purpose of preserving norms of acceptable behavior in the institution at large, the comittee shall recommend to the superintendent that a superintendent's proceeding be held;

(3) where the committee is of the opinion that a formal finding as to whether an inmate violated a

particular rule or regulation is necessary, irrespective of whether a superintendent's proceeding is required under paragraph two, the committee shall recommend to the superintendent that a superintentendent's proceeding be held;

(4) where the committee is of the opinion that it may secure compliance by an inmate with the policies of the Department through guidance and counseling and that the only measures needed will be those that are directed specifically at control of the behavior of the particular inmate, the committee shall proceed as provided in section 252.5;

(5) where the committee proceeds in accordance with paragraph four and an inmate persists in failure or refusal to follow the guidance and counseling of the committee, the committee shall recommend to the superintendent that a superintendent's proceeding be held;

(6) where the committee is of the opinion that an employee has acted improperly and is in need of further training, counseling or disciplinary action, it shall report such finding to the superintendent;

(7) the committee may proceed as provided in this subdivision and recommend reappraisal of the program of one or more inmates in a report to the superintendent.

V. Subdivisions (a), (b) and (e) of section 252.5 of such chapter and title are hereby REPEALED, and such section is hereby amended by adding thereto three new subdivisions, to be subdivisions (a), (b) and (e), to read as follows:

(a) The objective of adjustment committee action authorized by section 252.4 (b) (4) shall be to secure the inmate's understanding of and adherence to the

department's rules and policies governing inmate behavior.

(b) The action to be taken by the committee shall be based upon its evaluation of the inmate's attitude and his overall adjustment to the order and programs that must be maintained in the facility, as well as upon the committee's evaluation of the facts and circumstances of the particular incident described in the report or slip. The committee shall not be required to make a finding as to whether an inmate violated any particular rule or regulation and shall not direct the action it takes toward the objective of imposing punishment for a violation. The action taken by the committee shall be focused upon the degree to which the inmate has been and is cooperating with the policies, rules and programs of the department and the facility.

(e) Where the committee is of the opinion that present action is necessary in order to bring the behavior of the inmate within acceptable limits, the committee may restrict the activities of the inmate to the extent appropriate for control of the inmate. For this purpose the committee may impose one or more of the following restrictions; except that a person performing the function of the committee, pursuant to section 252.1 (f), may only impose the restriction specified in paragraph (1):

(1) Loss of one or more specified privileges for a specified period not exceeding two weeks;

(2) Confinement to his cell or room continuously or on certain days or during certain hours for a specified period not exceeding one week;

(3) Where the inmate's behavior is such that his presence in a general housing unit disrupts the order of that unit or is inconsistent with the best interests of the facility or of the inmate, confinement in a spe-

cial housing unit for a specified period not exceeding one week. In any case where the committee directs that an inmate be confined or continued in a special housing unit, the committee shall forthwith notify the deputy superintendent for program of its action. Upon receipt of such notification, the deputy superintendent for program shall assign a correction counselor to interview the inmate, to conduct a thorough analysis of the inmate's attitudes and behavior and to provide the inmate with guidance and counseling. If the inmate is to appear again before the adjustment committee, then prior to the inmate's next appearance before the committee, the correction counselor shall submit a report to the committee and to the deputy superintendent for program setting forth his behavioral evaluation of the inmate.

VI. Subdivision (f) of the section 252.5 of such chapter and title is hereby amended to read as follows:

(f) In any case where the committee imposes a restriction upon the activities of an inmate the committee may direct that the inmate appear before it at a specified time during the period of the restriction, or at the expiration thereof, for the purpose of determining whether there has been any change in the attitude of the inmate that would tend to assure his future cooperation with the policies of the department. Where the committee is of the opinion that such a change has occurred, it may discontinue the restriction or restrictions imposed or any portion thereof. Where the committee is of the opinion that such a change has not occurred, it may add restrictions, or extend the period of the restrictions, within the limits specified in subdivision (e) of this section. Successive extensions of the period of a restriction or restrictions may be made as many times as necessary so long as the committee interviews the inmate at least once during the period

and during each extension of the period, and, where the inmate is confined or continued in a special housing unit, so long as the procedures specified in paragraph (3) of subdivision (e) of this section are followed.

VII. Section 252.6 of such chapter and title is hereby REPEALED, and such chapter is hereby amended by adding thereto a new section, to be section 252.6, to read as follows:

252.6 Review of adjustment committee dispositions. All dispositions of the adjustment committee shall be subject to review in accordance with sections 270.1 and 270.3.

VIII. Subdivision (c) of section 253.2 of such chapter and title is hereby relettered to be subdivision (d), and such section is hereby amended by adding thereto a new subdivision, to be subdivision (c), to read as follows:

(c) The formal charge shall include a notice to the inmate substantially as follows:

"You are hereby advised that no statement made by you in response to the charge or information derived therefrom may be used against you in a criminal action or proceeding."

IX. Subdivisions (b) and (c) of section 253.3 of such chapter and title are hereby amended to read as follows:

(b) Such employee shall deliver a copy of the charge to the inmate [and] *at least 24 hours prior to the commencement of the superintendent's proceeding. He* shall explain the nature of the proceeding and the charge to the inmate. He also shall ask the inmate whether there is any factual matter that can be presented in his behalf and he shall investigate any reasonable factual claim the inmate may make.

(c) A written report of the action taken and the results of the investigation, if any, *including docu-*

mentary evidence and statements of witnesses interviewed, by the person designated to furnish assistance to the inmate shall be delivered to the person appointed to conduct the proceeding prior to the commencement of the procedure for determination of the charge.

X. Subdivisions (b), (c), (d), (e), (f) and (g) of section 253.4 of such chapter and title are hereby relettered to be subdivisions (c), (d), (e) (f) (g) and (h), respectively of such section.

XI. Subdivision (a) of section 253.4 of such chapter and title is hereby REPEALED, and such section is hereby amended and adding thereto two new subdivisions, to be subdivision (a) and (b), to read as follows:

(a) The person appointed to conduct the proceeding shall first interview the inmate and ascertain that he understands that no statement made by him in response to the charge or information derived therefrom may be used against him in a criminal action or proceeding.

(b) Then the person conducting the proceeding shall ask the inmate whether he admits or denies the substance of the charge. If the inmate admits the substance of the charge, or admits any variation of the charge that is acceptable to the interviewer, the inmate shall sign his name in the place indicated for that purpose. Where the admission accepted differs from the charge made, the points of difference shall be noted on the charge by the interviewer before the inmate signs. After the inmate has signed, as hereinabove provided, a disposition shall be made. If the inmate does not make any such admission, or refuses to sign, the proceeding shall continue as provided in this section and all further interviews shall be recorded stenographically or by an electronic recording device.

XII. Paragraph (6) of subdivision (a) of section 253.5 of such chapter and title is hereby REPEALED, and such subdivision is hereby amended by adding thereto a new subdivision, to be subdivision (6), to read as follows:

(6) Restitution for loss of or intentional damage to State property, to be made from existing and future funds standing to the credit of the inmate.

XIII. Paragraph (4) of subdivision (b) of section 253.5 of such chapter and title is hereby REPEALED, and such subdivision is hereby amended by adding thereto a new paragraph, to be paragraph (4), to read as follows:

(4) Restitution for loss of or intentional damage to State property, to be made from existing and future funds standing to the credit of the inmate.

XIV. Such chapter and title is hereby amended and adding thereto a new section, to be section 253.6, to read as follows:

253.6 Review of superintendent's proceeding dispositions. A superintendent's proceeding shall be subject to automatic review by the commissioner in accordance with sections 270.2 and 270.3.

XV. Such chapter and title are hereby amended by adding thereto a new part, to be part 263, to read as follows:

PART 263

STAY OF GOOD BEHAVIOR ALLOWANCE

Section 263.1 Stay of good behavior allowance. Between the time a decision has been made with respect to good behavior allowance and the time that an inmate would be eligible for parole consideration or for conditional or other release the award of any good

behavior allowance that has been granted shall be stayed and such allowance shall be suspended as provided by section 263.2.

263.2 Procedure for stay of good behavior allowance. (a) The superintendent's direction to file a formal charge in a superintendent's proceeding against an inmate shall stay the award of any good behavior allowance that has been granted such inmate and such allowance shall be suspended and of no force and effect until a final decision has been made in the superintendent's proceeding.

(b) If the good behavior allowance so stayed is one that has been determined by the commissioner, a copy of the charge shall immediately be forwarded to the commissioner.

(c) At the conclusion of the proceeding, if the disposition does not involve loss of good behavior allowance, the allowance previously granted shall be reinstated. Where the disposition does involve loss of good behavior allowance, the procedure shall be as follows:

(1) In the case of an indeterminate sentence, the disposition shall automatically be reviewed by the commissioner in accordance with the procedure set forth in subdivisions (b) and (c) of section 270.2;

(2) In any other case the superintendent may revise his prior determination to accommodate the disposition made; and

(3) In all cases the inmate shall be specifically advised of his right of review under section 270.4.

XVI. Section 270.5 of such chapter and title is hereby REPEALED.

XVII. Section 270.1 of such chapter and title is hereby amended by adding thereto a new subdivision, to be subdivision (e), to read as follows:

(e) Where the function of the adjustment committee is performed by the superintendent pursuant to section 252.1 (f), the review of adjustment committee decisions and actions required or permitted the superintendent by this section shall for correctional camps be performed by the director of camps and for other correctional facilities by an employee designated by the deputy commissioner in charge of legal services.

XVIII. Section 303.3 of chapter 6 of such title is hereby REPEALED, and such chapter is hereby amended by adding thereto a new section, to be section 303.3, to read as follows:

303.3 Health Care Inspections. Every inmate confined in a segregation unit shall be visited by the facility health services director or a physician, nurse or physician's associate designated by the facility health services director who shall examine into the inmate's health within 24 hours of the commencement of such confinement and once in every 24 hour period thereafter for the duration of the confinement.

XIX. These rules shall take effect December 2, 1974.

PETER PREISER
Peter Preiser
Commissioner of
Correctional Services

November 4, 1974

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Janet Portelly , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellants herein. On the 3rd day of February , 1975 , she served the annexed upon the following named person :

Steven M. Latemer, Esq.
Bronx Legal Services Cop. C
579 Courtlandt Avenue
Bronx, New York 10451

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Janet Portelly

Sworn to before me this
3d day of February , 1975

Assistant Attorney General
of the State of New York